Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MARK A. MORGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether to establish a claim of "actual innocence" sufficient to overcome a procedural default, a habeas petitioner's claim that his conduct was beyond the power of the federal government to proscribe must, at the time of his petition, be clearly established by controlling precedent.

2. Whether petitioner's guilty plea to violating 18 U.S.C. § 666 forecloses his as-applied challenge to the constitutionality of that statute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mark A. Morgan respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-14a) is reported at 230 F.3d 1067. The order of the *en banc* court of appeals denying petitioner's petition for rehearing (App. 15a-16a) is reported at 244 F.3d 674. The order of the district court (App. 17a-26a) denying petitioner's motion to vacate and set aside sentence is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000. A timely petition for rehearing was denied on March 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case presents questions about the proper scope of the "actual innocence" gateway that permits collateral review of procedurally defaulted claims, and about the types of constitutional challenges that survive a guilty plea. Mark Morgan, a Kansas City developer, pleaded guilty to violating 18 U.S.C. § 666 for conspiring to bribe a local official to make zoning changes on non-federally funded projects. As even the Eighth Circuit conceded below, an intervening decision of this Court "suggest[s]" (App. 5a) that the federal government lacks constitutional authority to punish Mr. Morgan's purely local acts of bribery, *see Salinas v. United States*, 522 U.S. 52, 61 (1997), and numerous intervening court of appeals decisions unequivocally confirm that Section 666 "does not reach misconduct of local officials whose actions do not threaten the integrity of federal funds or programs." App. 3a (describing holding of *United States v. Phillips*, 219 F.3d 404, 412-14 (5th Cir. 2000)).[1] Indeed, one judge below explicitly concluded that "Congress lacked the power to enact" the *only* crime of which Mr. Morgan stands convicted. App. 13a (Bye, J., specially concurring); *id.* at 16a (Bye., J., dissenting). Nonetheless, the Eighth Circuit wrongly concluded that Mr. Morgan's as-applied challenge to

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[1] *See also* App. 2a-3a ("*United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (*Salinas* may be read as requiring a threat to a federal program's integrity and proper operation to assure § 666 is not unconstitutionally applied); *United States v. Zwick*, 199 F.3d 672, 687 (3rd Cir. 1999) (§ 666 requires government to prove federal interest is implicated by defendant's offense conduct)").

Section 666 was not a claim of "actual innocence" that would entitle him to relief when raised for the first time on habeas.

That clearly mistaken ruling implicates two distinct circuit splits. First, the Eighth Circuit's conclusion that a person may raise a claim of actual innocence only if an "intervening *controlling* precedent . . . has *clearly established* [the defendant's] actions do not constitute a crime" (App. 4a-5a), squarely conflicts with *Davis v. United States*, 417 U.S. 333, 346 (1974), and a ruling of the Seventh Circuit. *See Howard v. United States*, 135 F.3d 506, 508 (7th Cir.), *cert. denied*, 525 U.S. 832 (1998). Second, the Eighth Circuit's ruling that a guilty plea waives as-applied challenges to a statute (App. 6a) squarely conflicts with this Court's precedent, *see Haynes v. United States*, 390 U.S. 85, 87 n.2, 99 (1968), and opens up a rift with the Third, Fourth, and Ninth Circuits, all of which have held that such claims survive guilty pleas. *See United States v. Sandsness*, 988 F.2d 970, 971 (9th Cir. 1993); *United States v. Sams*, 521 F.2d 421, 426 (3d Cir. 1975); *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975) (same).

These issues are of increasing importance to the lower federal courts and warrant this Court's review. Recent precedents have called into question the validity of a tremendous number of criminal convictions and the federal courts are faced with the question whether habeas petitioners may raise challenges analogous to those already recognized by this Court or are limited to claims "clearly established" by existing "controlling precedent." App. 4a. This case also implicates fundamental questions of justice. As the Third Circuit noted, in finding relief appropriate under circumstances identical to Mr. Morgan's, when a statute can not constitutionally be applied to the defendant, "*there is no longer any governmental interest in continuing to punish [him] . . . . [U]pholding the conviction will not vindicate any legitimate societal goal.*" *Sams*, 521 F.2d at 426 (emphasis added). Further review is warranted.

A. Background and Prior Proceedings

Mark A. Morgan is a real-estate developer in Kansas City. In successive indictments, Mr. Morgan and two co-defendants were charged with conspiring to donate money to charities designated by Michael B. Hernandez, a Kansas City councilman, in order to influence his votes on two local ordinances. The first conspiracy concerned a local ordinance rezoning land to facilitate the construction of single-family housing. The second concerned the city's purchase of a plot of land owned by Mr. Morgan and his co-defendants. Councilman Hernandez later converted the donations to his own use.

In July 1995, a federal grand jury indicted Mr. Morgan and two co-defendants, charging them with conspiring to bribe a public official, federal-program bribery in violation of Section 666, and money laundering. Mr. Morgan moved to dismiss the indictment, arguing in relevant part that both the United States Constitution and Section 666 itself require the government to demonstrate a connection between the alleged bribes and federal-program funds received by Kansas City. In November 1995, Judge Joseph E. Stevens, Jr. dismissed the six money-laundering counts, but declined to dismiss the bribery and conspiracy counts, holding that "there is no constitutional requirement that the government show a nexus between the federal funds and the alleged incidents of bribery." C.A. App. 51. Almost two years later, in July 1997, the grand jury returned a nine-count superseding indictment against Mr. Morgan and his co-defendants, again charging them with conspiracy and federal-program bribery under Section 666. C.A. App. 53.

As relevant here, Section 666 prohibits the solicitation or payment of bribes to agents of state or local governments in connection with any government "business, transaction, or series of transactions" valued at $5,000 or more (18 U.S.C. § 666(a)) *if* the government "receives, in any one year period,

benefits in excess of $10,000 under a Federal program . . . ." § 666(b). The statute also applies to non-governmental "organization[s]" that receive $10,000 in federal benefits. *Id.* Unlike many federal criminal laws, which were enacted pursuant to Congress' commerce or postal power, Section 666 was enacted under Congress' Article I spending power. *See* U.S. Const. Art. I, §8, cl. 1 ("Congress shall have Power . . . to pay the Debts and provide for the common Defense and general Welfare of the United States"). The superseding indictment alleged that Councilman Hernandez was an "agent" of the City of Kansas City, that the City of Kansas City was a "local government," and—most importantly—that "[t]he City of Kansas City, Missouri, received federal benefits of over $10,000 under Federal programs involving grants, contracts, subsidies, loans, guarantees, insurance or other forms of assistance" during the relevant period. C.A. App. 54. *See generally* 18 U.S.C. § 666(b), (d)(1), (d)(3). The superseding indictment contained no other allegations about federal funding or programs. *See* C.A. App. 53-68.

Mr. Morgan again moved to dismiss the Section 666 charges as unconstitutional because the government had failed to allege that the bribes had in any way threatened the integrity of federal-program funds. Magistrate Judge Robert E. Larsen concluded that "the enactment of § 666 was a proper exercise of Congress' power under the Spending Power" (C.A. App. 75) and recommending that the motion be denied. Mr. Morgan filed a timely objection to Magistrate Judge Larsen's recommendation. C.A. App. 23. Because the case was resolved before trial, Judge Stevens never addressed Mr. Morgan's motion to dismiss the superseding indictment.

On the eve of trial, Mr. Morgan agreed to plead guilty to the superseding indictment's two conspiracy counts in exchange for the government's dismissal of the seven substantive program-bribery charges. During the change-of-plea hearing, Judge Stevens asked the government to specify what it would have proven had the case gone to trial. The

government described the alleged conspiracy and then turned to the jurisdictional requirements of Section 666 (C.A. App. 95-96) (emphasis added):

> [THE GOVERNMENT]: . . . The government would also be able to prove [that] the project that was being affected, the transaction that was being affected by this bribe was worth more than five thousand dollars to the City of Kansas City, Missouri, and that in that fiscal year and the year after, the City of Kansas City, Missouri received more than ten thousand dollars in federal funds.
>
> * * *
>
> THE COURT: More than ten thousand in federal funds for this project?
>
> [THE GOVERNMENT]: *No*, the statute requires, and I believe the court has ruled in this case, that there is no need for the direct flow of funds to be traced [to this project], relying on the Congressional history of that statute.

During the remainder of the plea hearing and factual proffer, the government *never* asserted that any of the federal-program funds received by the City of Kansas City were in any way affected or threatened by either of the bribery conspiracies at issue. Instead, the government relied *solely* on the fact that Kansas City—like thousands of other cities and towns—received substantial federal funding.

On April 21, 1998, Judge Stevens entered judgment and sentenced Mr. Morgan to eighteen months in prison followed by two years of supervised release, and ordered him to pay a fine and costs of confinement. C.A. App. 106-10. As an explicit condition of the plea agreement, Mr. Morgan was required to waive "his right to appeal any aspect of his conviction." C.A. App. 78. Accordingly, Mr. Morgan did not appeal.

B. Section 2255 Motion and District Court's Ruling

On April 12, 1999, Mr. Morgan timely filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255. Mr. Morgan argued that Section 666 was unconstitutionally applied to his conduct, because "[t]he government neither alleged nor proved that the conduct for which [he] was indicted, convicted and sentenced had any connection with the expenditure of federal funds or posed any threat to the integrity and proper operation of a federal program." Memorandum In Support of Motion of Mark A. Morgan to Vacate and Set Aside Sentence Pursuant to 28 U.S.C. § 2255, at 1. The government did not contest that Mr. Morgan's conduct posed no threat to the integrity of federal funds or programs, and asserted that the requisite federal nexus was provided by Kansas City's receipt of at least $10,000 in federal benefits. C.A. App. 113.

Without holding a hearing, on June 14, 1999 Judge Gary A. Fenner denied the motion on two grounds. *First*, Judge Fenner concluded that the claim was procedurally barred because Mr. Morgan had not appealed the issue. Judge Fenner concluded that Mr. Morgan did not qualify for the "actual innocence" exception to that procedural bar because his challenge to the application of Section 666 was a "claim of legal error, rather than factual error." C.A. App. 121. *Second*, Judge Fenner rejected the motion on the merits, finding that the necessary "federal 'nexus' [wa]s supplied by [Section 666's] requirement that the government or agency received at least $10,000 in a year . . . ." C.A. App. 123.

C. Eighth Circuit Affirmance

The Eight Circuit affirmed. The court conceded that this Court's opinion in *Salinas* "suggested" (App. 5a) that Section 666 could not constitutionally be used to prosecute local acts of bribery, and acknowledged the mass of "later circuit cases" (*id.* at 4a) holding that "§ 666 does not reach misconduct of local officials whose actions do not threaten

the integrity of federal funds." *Id.* at 3a (describing *Phillips*, 219 F.3d at 412-14). However, the court concluded that Mr. Morgan's as-applied challenge to the statute was "not an actual innocence claim he may raise for the first time on collateral review" (*id.* at 4a) because the favorable opinions from other circuits were not binding on the Eighth Circuit. *Id.* at 4a-5a ("there is no intervening controlling precedent that has clearly established Morgan's actions do not constitute a crime . . . ."). Second, the court of appeals held that even if Mr. Morgan had shown a "gateway" claim of actual innocence, his claim that he could not constitutionally be prosecuted for local acts of bribery was insufficient to challenge a knowing and counseled guilty plea. Rather, the court held, a counseled guilty plea could be challenged only by a *facial* challenge to the constitutionality of the statute. *Id.* at 5a-6a.

Judge Bye concurred specially. He agreed with Mr. Morgan that "Congress exceeded its proper authority in enacting § 666" and thus "the law is unconstitutional, void *ab initio*." App. 10a. Because Congress' Spending Clause power is "comprehensible only by analogy to principles of contract law," (*id.* at 11a (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)), Congress may indirectly regulate state conduct by attending conditions to grants of money, but it is powerless "to proscribe the conduct of third persons who aren't parties to the funding contract." *Id.* at 12a-13a. Because the administrative panel of the Eighth Circuit had not included Mr. Morgan's facial challenge to the statute in the certificate of appealability, C.A. App. 126, Judge Bye concurred in the affirmance. *Id.* at 14a.

Mr. Morgan sought rehearing and rehearing *en banc*, arguing that the panel decision was in error and arguing that the court should have revised the scope of the certificate of appealability to include Mr. Morgan's facial challenge in light of Judge Bye's conclusion that the statute was facially

unconstitutional. Nearly four months later on March 19, 2001, the *en banc* Eighth Circuit denied the petition. The *en banc* court clarified that its precedent did not foreclose the ability of "an Eighth Circuit hearing panel to exercise its discretion to consider *sua sponte* issues beyond those specified in a certificate of appealability." App. 15a. Judge Bye concurred in that decision, but dissented from the court's failure to rehear Mr. Morgan's facial challenge to the statute *en banc*, noting that the constitutional challenge "has merit" and "bears careful consideration by our court." *Id.* at 16a.

REASONS FOR GRANTING THE PETITION

This Court's decision in *Salinas v. United States*, 522 U.S. 52 (1997), "may be read to indicate that the 'threat to the integrity and proper operation of [a] federal program' created by the corrupt activity is *necessary to assure that [§ 666] is not unconstitutionally applied*." *United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (quoting *Salinas*, 522 U.S. at 61) (first alteration in original; emphasis added); *accord United States v. Phillips*, 219 F.3d 404, 423 (5th Cir. 2000) (Emilio M. Garza., J., concurring in part and dissenting in part). Just last Term in *Fischer v. United States*, 529 U.S. 667 (2000), this Court concluded that a broad reading of Section 666 would "upse[t] the proper federal balance." *Id.* at 681; *accord id.* at 689 n.3 (Thomas, J., dissenting) ("[w]ithout a jurisdictional provision that would ensure that in *each* case the exercise of federal power is related to the federal interest in a federal program, § 666 would criminalize routine acts of fraud or bribery, which, as the Court admits, would 'upse[t] the proper federal balance'").

Numerous other federal courts have held that the constitution prohibits prosecution under Section 666 unless the conduct has threatened the integrity of federal funds. *United States v. Zwick*, 199 F.3d 672, 687 (3d Cir. 1999) ("Applying § 666 to offense conduct, absent evidence of any

federal interest, would appear to be an unconstitutional exercise of power under the Spending Clause."); *United States v. McCormack*, 31 F. Supp. 2d 176, 186 (D. Mass. 1998) (same). Still other courts have interpreted Section 666 to require a showing of a threat to federal funds in part to avoid the constitutional concerns of a statute that had no such requirement. *Phillips*, 219 F.3d at 412-14 and n.13 (to support conviction under § 666, "the fraud must have the potential to affect the identified federal funds or program"); *Santopietro*, 166 F.3d at 93 (caselaw "requires at least some connection between the bribe and a risk to the integrity of the federally funded program"); *United States v. Frega*, 933 F. Supp. 1536, 1543 (S.D. Cal. 1996) (to satisfy statute must show federal funds "were corruptly administered, [or] were in danger of being corruptly administered"); *but see United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999) (no statutory requirement of threat to federal funds). *See Generally* Charles F.C. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo. L.J. 1171, 1172, 1215 (1977) (emphasis added) (then-Director of Watergate Special Prosecution Force observes that federal prosecution of local corruption is "perhaps *the most sensitive area* of potential federal-state conflict" and that "there is *no legitimate federal interest to be protected* [by federal prosecution]" if local corruption does not undermine federal law enforcement).

The government did not allege that Mr. Morgan's conduct in any way threatened the integrity of federal funds, and the record is barren of any proof to support such a claim. Thus, Mr. Morgan has raised a substantial claim that he cannot lawfully be punished by the federal government for his conduct bribing a local official regarding zoning and property ordinances, which are "matter[s] of paramount local concern." *Gardner v. Baltimore Mayor*, 969 F.2d 63, 69 (4th Cir. 1992). The Eighth Circuit's decision below barring Mr. Morgan from proceeding with his claim is clearly wrong,

conflicts with this Court's precedent, and implicates two distinct circuit splits involving important issues of federal law. Further review is warranted.

I. THE EIGHTH CIRCUIT'S ERRONEOUS CONCLUSION THAT A PETITIONER IS "ACTUALLY INNOCENT" ONLY IF A CONTROLLING COURT HAS SQUARELY ESTABLISHED HIS ENTITLEMENT TO RELIEF CONFLICTS WITH THIS COURT'S PRECEDENT AND DECISIONS OF OTHER COURTS OF APPEALS

Federal courts will entertain the procedurally defaulted claim of a habeas petitioner who pleaded guilty if he can demonstrate that he is "probably" actually innocent of the offense. *Bousley v. United States*, 523 U.S. 614, 623 (1998). The purpose of the "actual innocence" gateway is to limit the federal courts' equitable discretion to consider procedurally defaulted claims to the small group of petitioners most deserving of relief: Those whose conduct is not punishable, for whom punishment would be a "fundamental miscarriage of justice." *Herrera v. Collins*, 506 U.S. 390, 404 (1993).

There is no serious question that Mr. Morgan's as-applied constitutional challenge to the application of Section 666 to local acts of bribery not threatening federal funds is the *type* of contention that will support a claim of "actual innocence." A claim that the federal government lacks constitutional authority to prosecute a crime is a paradigmatic example of an actual innocence claim. As this Court noted in *Bousley*, a determination that conduct is "*beyond the power of the criminal law-making authority to proscribe*, necessarily carr[ies] a significant risk that a defendant stands convicted of an act that the law does not make criminal," *Bousley*, 523 U.S. at 620 (internal quotations and citations omitted; emphasis added), which "'inherently results in a complete miscarriage of justice' and 'present[s] exceptional

circumstances' that justify collateral relief under § 2255." *Davis v. United States*, 417 U.S. 333, 346-47 (1974). Thus, even after a defendant has "pleaded guilty . . . § 2255 is available for a case in which the defendant argues that the conduct for which he was convicted never rose to the level of a federal offense." *Howard v. United States*, 135 F.3d 506, 508 (7th Cir.), *cert. denied*, 525 U.S. 832 (1998); *see also Woodruff v. United States*, 131 F.3d 1238, 1243 (7th Cir. 1997) (habeas relief is available "where someone has actually pleaded guilty to conduct not made unlawful"), *cert. denied*, 524 U.S. 956 (1998).

Although not disputing that as-applied challenges to federal prosecution are the *sorts* of claims that will support a finding of actual innocence (*see* App. 4a-5a), the Eighth Circuit concluded that Mr. Morgan's claim fell short because "[t]here is no intervening *controlling* precedent that has *clearly established* Morgan's actions do not constitute a crime."[2] *Id.* at 4a-5a (emphasis added). Essentially, the court held that Mr. Morgan could not proceed because neither this Court nor the Eighth Circuit had *already* squarely held Section 666 unconstitutional when applied to local conduct.

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[2] The Eighth Circuit did not seem to contest that Salinas was an "intervening" decision (App. 5a), and in any event, the requirement of an intervening change of law is amply satisfied in this case by *Salinas* and its progeny. Prior to those holdings, Mr. Morgan's spending-clause challenge would have been considered borderline frivolous given the extreme rarity of successful challenges to Spending Clause enactments. *See, e.g., United States v. Butler*, 297 U.S. 1, 68 (1936). As Judge Bye noted below, "'[n]o court . . . has ever struck down a federal statute on grounds that it exceeded the Spending Power.' *Commonwealth of Va. v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996)." App. 13a. Significantly, between the time of indictment and conviction in this case, the Eighth Circuit rejected 16 consecutive federalism challenges to various federal criminal statutes. *See* Cristian M. Stevens, *Revolutionary or Aberrational?: The Status of the Supreme Court's Recent Federalism Cases in the Eighth Circuit*, 44 St. Louis L.J. 529, 624 (2000) (discussing cases and concluding that effect of this Court's federalism precedents in the Eighth Circuit "has been surprisingly minimal").

A. The Eighth Circuit's Decision Is Clearly Wrong

There is no basis in logic or law for such a restriction. The narrowing function of the "actual innocence" gateway is served simply by limiting its availability to persons who can establish their factual innocence, or whose legal claims, if well taken, would place their admitted conduct "beyond the power of the criminal law-making authority to proscribe...." *Bousley*, 523 U.S. at 620. Because a petitioner must *also* prevail on the merits of his underlying claim before he can obtain relief, *Herrera*, 506 U.S. at 404, there is no basis for erecting such an obstacle around the threshold claim to further restrict an already narrow category. Indeed, the Eighth Circuit gave no reason why such a restriction would be warranted.

The Eighth Circuit's decision engrafts an entirely alien requirement onto the standard for actual innocence. Even when establishing procedural bar rules for habeas challenges by state prisoners—which, because they involve decisions of coordinate state courts, present comity concerns not implicated here—this Court's procedural rules permit habeas petitioners to raise novel constitutional claims so long as, *if those claims are found to be valid*, they will "place certain kinds of primary . . . conduct beyond the power of the law-making authority to proscribe." *Teague v. Lane*, 489 U.S. 288, 307 (1989). It would be anomalous to require more exacting standards for claims raised by federal prisoners in cases that do not implicate comity. Furthermore, this requirement is inconsistent with the detailed standards established by Congress in the stringent Antiterrorism and Effective Death Penalty Act. For habeas petitions filed more than one year after a conviction becomes final, Congress explicitly limited legal claims to those involving rights that "ha[ve] been newly recognized *by the Supreme Court* and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2255 (emphasis added). The AEDPA places no such limitation on petitions (like this one) filed within a year

of when the conviction became final. *See id.* There is no basis for the Eight Circuit's decision to create such a procedural hurdle as a matter of common law.

B. The Eight Circuit's Judgment Conflicts With Decisions Of This Court And Other Federal Courts of Appeals

The Eighth Circuit's standard squarely conflicts with decisions of this Court and other courts of appeals, which have not required that actual innocence claims be limited to those *already* recognized by a controlling court. In *Davis v. United States*, 417 U.S. 333 (1974), this Court concluded the petitioner had established a gateway claim of actual innocence although this Court had not already established his claim to be a valid one. Rather, this Court held a legal claim was sufficient to proceed if the petitioner would be actually innocent "*if [h]is contention is well taken.*" *Id.* at 346 (emphasis added). Far from requiring a showing that Davis' entitlement to relief was "clearly established" at the time, the Court *explicitly disclaimed* any views on the merit of his claim that his induction notice was invalid. *Id.* at 347.

In *Davis*, a federal prisoner on habeas challenged his conviction for disregarding his draft notice, arguing that his induction order was invalid and thus could not be the basis for a valid conviction. Davis relied on *Gutknecht v. United States*, 396 U.S. 295 (1970), decided after his conviction, in which this Court had invalidated a conviction because the induction notice was unlawful. On direct appeal, both the district court and the Ninth Circuit squarely had held that *Gutknecht* did not affect Davis' conviction and affirmed. 417 U.S. at 339. The Ninth Circuit then decided *United States v. Fox*, 454 F.2d 593 (9th Cir. 1971), involving facts comparable to Davis' case, in which it granted relief based on *Gutknecht*. Davis argued that he was entitled to relief based on *Fox*. On habeas review, both the district court and the Ninth Circuit held that Davis was not entitled to relief under

Fox. The Ninth Circuit's *Fox* decision obviously was not "controlling" on this Court, nor was it even controlling on the Ninth Circuit, which already had *squarely held* in Davis' own case that *Gutknecht* did not entitle him to relief.[3]

This Court could not have been clearer that the assertion of a claim that conduct could not legally be punished was *itself* sufficient to justify proceeding to the merits:

> In this case, the petitioner's contention is that the decision in *Gutknecht v. United States*, as interpreted and applied by the Court of Appeals for the Ninth circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. *If this contention is well taken*, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief under § 2255. Therefore, *although we express no view on the merits of [Davis'] claim*, we hold that the issue he raises is cognizable in a § 2255 proceeding.

417 U.S. at 346-47.

Similarly, the Seventh Circuit has held that the allegation alone is enough. In *Howard v. United States*, 135 F.3d 506 (1998), that court held that "§ 2255 is available for a case in which the defendant *argues* that the conduct for which he

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[3] To the extent there were inconsistencies between the Ninth Circuit's decision in *Davis* and its later decision in *Fox*, under bedrock rules of appellate practice, the *earlier* decision in *Davis* controlled. *E.g.*, *Montana v. Johnson*, 738 F.2d 1074, 1077 (9th Cir. 1984)) ("We are bound by the decisions of prior panels.").

was convicted never rose to the level of a federal offense." *Id.* at 508 (emphasis added). And unlike the Eighth Circuit below, that court did not require that controlling precedent have "clearly established" petitioner's right to relief before his claim would even be considered. Indeed, in the end, the Seventh Circuit found the claim invalid and denied relief. *Id.* at 510.

II. THE PANEL'S ERRONEOUS DECISION THAT AS-APPLIED CHALLENGES TO THE CONSTITUTIONALITY OF A STATUTE ARE INSUFFICIENT TO CHALLENGE A GUILTY PLEA IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND RULINGS OF OTHER COURTS OF APPEALS

The Eight Circuit also held that, even if Mr. Morgan could show a "gateway" claim of actual innocence, his as-applied challenge to the constitutionality of Section 666 was insufficient to overcome his guilty plea.[4] App. 5a. The court held that although a knowing and voluntary guilty plea legitimately may be challenged through a *facial* challenge to the constitutionality of a statute (*id.* at 6a), as-applied constitutional challenges of the sort raised by Mr. Morgan are insufficient. *Id.* That holding is mistaken and sharply conflicts with decisions of this Court and of other circuits.

The Eighth Circuit's conclusion is plainly foreclosed by *Haynes v. United States*, 390 U.S. 85 (1968). Petitioner

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[4] To the extent the Eighth Circuit decision suggests that actual innocence is insufficient to challenge a guilty plea, there is no basis for such a claim. It is well established that actual innocence is itself a sufficient basis for raising a defaulted challenge to a guilty plea on habeas. *See, e.g.*, *United States v. Benboe*, 157 F.3d 1181, 1184 (9th Cir. 1998) (review of guilty plea on habeas not procedurally barred although the petitioner "d[id] not specifically contend that his plea was involuntary or unintelligent," because he "d[id], however, argue that he is innocent"); *accord United States v. Sanders*, 157 F.3d 302, 305 (5th Cir. 1998); *Howard*, 135 F.3d at 508.

Miles Haynes pleaded guilty to knowingly possessing a particular type of firearm (a sawed-off shotgun or machine-gun) that had not been registered with the Secretary of the Treasury, in violation of 26 U.S.C. §§ 5841 and 5851. Haynes claimed that he could not validly be convicted of failing to register under these statutes because, as possession of such weapons was ordinarily criminal, registering would have violated his right against self-incrimination. The Court agreed, taking care to note that it was not finding the provisions unconstitutional "on their face" because "there are a number of apparently uncommon circumstances in which registration is required of one who has not violated the [law]." 390 U.S. at 99. The Court emphatically held that "[p]etitioner's plea of guilty did not, *of course*, waive" his right to raise this claim by pleading guilty. *Id.* at 87 n.2 (emphasis added) (citing *United States v. Ury*, 106 F.2d 28, 28 (2d Cir. 1939) (guilty plea did not foreclose claim statute exceeded congressional commerce power)).

Unsurprisingly, numerous courts of appeals have adhered to *Haynes* and held that as-applied challenges to a statute is a "jurisdictional" claim not waived by entering a plea of guilty. In *United States v. Sandsness*, 988 F.2d 970 (1993), the Ninth Circuit held that petitioner's claim that the statute he had pleaded guilty to violating "is vague *as applied*" (*id.* at 971) survived his guilty plea.[5] And in *United States v. Sams*, 521 F.2d 421, 426 (3d Cir. 1975), and *United States v. Bluso*, 519 F.2d 473, 474 (4th Cir. 1975), the Third and Fourth Circuits held that prisoners on collateral review could challenge guilty pleas to violating wagering tax statutes that the Supreme

[5] Although the Eighth Circuit claimed below (App. 6a) that *Sodders v. Parratt*, 693 F.2d 811 (8th Cir. 1982) (per curiam) involved a facial claim of vagueness, that opinion explicitly noted that the matter at issue was whether "the statute is constitutional *as applied* to Sodders." *Id.* at 813 (emphasis added).

Court had found to be unconstitutional *as applied* because of the Fifth Amendment Right against self-incrimination.[6]

The Eighth Circuit's contrary conclusion is fundamentally misguided. As this Court explained in *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), "[a] guilty plea . . . simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt . . . ." *Id.* at 62 n.2. However, that Court was quite explicit that petitioners could nonetheless bring claims that the crime of conviction "is one which the [sovereign] *may not constitutionally prosecute*." *Id.* (emphasis added). That, of course, is *exactly* the type of claim that Mr. Morgan has brought: A claim that the federal government may not constitutionally prosecute him for local acts of bribery that did not threaten the integrity of federal funds.

There is no logical reason to distinguish, as the Eighth Circuit did, between as-applied and facial challenges. Whether a petitioner attacks a law as beyond the power of Congress to enact (making it facially invalid), or whether he argues the government lacked constitutional authority to apply that statute to his conduct (making it unconstitutional as applied), both circumstances implicate the same underlying principle underlying the "jurisdictional" exception to the rule that a guilty plea waves constitutional claims: Society has no interest in incarcerating persons whose admitted conduct cannot lawfully be punished. As the Third Circuit wrote in reversing a guilty plea on collateral review, if a statute cannot be constitutionally applied to petitioner, "there is no longer any governmental interest in continuing to

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[6] *See generally Marchetti v. United States*, 390 U.S. 42, 61 (1968) (noting that statutes were not facially unconstitutional and could be enforced whenever "a taxpayer is not confronted by substantial hazards of self-incrimination," such as if he lived in a jurisdiction that permitted gaming).

punish [him] . . . . [U]pholding the conviction will not vindicate any legitimate societal goal." *Sams*, 521 F.2d at 426. "Surely it offends our system of ordered liberty to permit a prisoner to remain incarcerated" (App. 7a) (Bye, J., specially concurring) when his conduct cannot *constitutionally* be punished, whether application of the statute is unconstitutional in all instances (*id.*) or only in his own case. In either event, the admitted conduct is "not a crime" and the conviction is not merely erroneous, but "illegal and void, and cannot be a legal cause of imprisonment." *Ex Parte Siebold*, 100 U.S. 371, 376-77 (1880).

III. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING

This case raises vitally important issues of federal law. The conflict over the meaning of "actual innocence" is of great practical and doctrinal significance. In recent years, this Court has taken a more active role in circumscribing Congress' efforts to encroach on the states' prerogative to define criminal conduct.[7] Each of this Court's cases narrowly

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[7] *E.g.*, *Jones v. United States*, 529 U.S. 848, 858 (2000) (burning of an owner-occupied private residence not used for any commercial purpose does not qualify as property "used in" commerce or commerce-affecting activity subject to prosecution under 18 U.S.C. §844(i), in part because reading statute to "encompas[s] the arson of an owner-occupied private home would effect . . . a change [in the federal-state balance], for arson is a paradigmatic common-law state crime"); *United States v. Lopez*, 514 U.S. 549 (1995) (Gun Free School Zones Act exceeded Congress' Commerce Clause authority); *Cleveland v. United States*, 121 S. Ct. 365, 373 (2000) ("Equating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities," which Court refused to do in the absence of clear instruction from Congress); *Fischer*, 529 U.S. at 681 (cautioning that reading § 666 to encompass "[a]ny receipt of federal funds" resulting "in coverage of all recipient fraud" would "upse[t] the proper federal balance"); *see also id.* at 689 n.3 (Thomas, J., dissenting); *see also United States v. Morrison*, 529 U.S. 598 (2000) (striking down civil suit provisions of

defining federal crimes to avoid constitutional concerns or striking them down when they exceeded congressional authority has potentially broad-reaching implications, calling into question the validity of convictions for similar offenses.[8] This Court's resolution of this issue will determine whether petitioners will be permitted to raise claims analogous to ones already recognized by this Court, or whether prisoners with valid claims of actual innocence must remain imprisoned awaiting a "controlling precedent . . . [that] clearly establishe[s] [their] actions do not constitute a crime." App. 4a. Defendants have already begun seeking to extend the reasoning of this Court's precedents to new offenses, *e.g.*, *United States v. Jones*, 231 F.3d 508, 514 (9th Cir. 2000) (*Jones* challenge to 18 U.S.C. § 922(g)); *United States v. Wesela*, 223 F.3d 656, 659 (7th Cir. 2000) (same); *United States v. Malone*, 222 F.3d 1286, 1295 (10th Cir. 2000) (*Jones* challenge to Hobbs Act), and these issues will arise with increasing frequency in the future. A decision in this case would provide critical guidance to the lower courts at a

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Violence Against Women Act as exceeding Congress' Commerce Clause power); *Solid Waste Authority v. Army Corps of Engineers*, 121 S. Ct. 675 (2001) (invoking doctrine of constitutional doubt to construe Clean Water Act not to permit Migratory Bird Rule).

[8] For example, last Term's *Jones* decision holding that owner-occupied residences were not "used in interstate or foreign commerce" potentially has implications for convictions under federal firearm statutes for possessing firearms or ammunition "in or affecting commerce" (18 U.S.C. § 922(g)(1), (8), (9)), under the Hobbs Act for robberies or extortion that "obstruc[t], dela[y], or affec[t] commerce" (18 U.S.C. § 1951(a)), for money laundering if the transaction "affects interstate or foreign commerce" (18 U.S.C. § 1956), and for many other offenses. *See, e.g.*, 15 U.S.C. § 1173(a)(1) (requiring registration of "any person engaged in the business of manufacturing gambling devices, if the activities of such business in any way affect interstate or foreign commerce"); 15 U.S.C. § 1245(a) (banning possession, manufacture, sale, or importation "in or affecting interstate commerce" of ballistic knife). There are dozens of other statutes like these.

time when the number of federalism-based challenges to statutes is multiplying.

Equally significant is the related issue of whether as-applied constitutional claims are sufficient to challenge a knowing and voluntary guilty plea. The Eighth Circuit decision is far more restrictive than the rule adopted by this Court in *Haynes* and followed in the Third, Fourth, and Ninth Circuits. The proper standard to be applied thus has tremendous practical importance for the scope of proper challenges to otherwise valid guilty pleas. Given the central importance of guilty pleas—which resolve the vast majority of criminal cases in our criminal justice system—the importance of this question is impossible to exaggerate. Resolving these issues that have divided the courts of appeals would give the Court the opportunity to provide uniformity in the proper application of "the equitable discretion of habeas courts to see that the federal constitutional errors do not result in the incarceration of innocent persons . . . ." *Herrera*, 506 U.S. at 404.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 2001

APPENDIX

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-2798

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States Court for the
v.	*	Western District of
	*	Missouri
Mark A. Morgan,	*	
	*	
Appellant.	*	

Submitted: September 12, 2000
Filed: October 24, 2000

Before RICHARD S. ARNOLD, FAGG, and BYE, Circuit Judges

FAGG, Circuit Judge:

Mark A. Morgan, a real estate developer, and two codefendants were charged with participating in two schemes to bribe a Kansas City, Missouri councilman to influence the councilman's votes on two local ordinances. In a superseding indictment, the Government charged Morgan with two counts of conspiracy to violate 18 U.S.C. § 666, which prohibits the solicitation or payment of bribes to agents of state or local governments in connection with any government "business, transaction, or series of transactions" valued at $5000 or

more if the government "receives, in any one year period, benefits in excess of $10,000 under a Federal program." The indictment also contained seven substantive counts of bribery in violation of § 666. The Government alleged the councilman was an agent of the City of Kansas City, the City was a local government, and the City "received federal benefits of over $10,000 under Federal programs." Morgan filed a motion to dismiss the indictment because it did not allege his conduct had any connection with the expenditure of federal funds or posed any threat to the integrity and proper operation of a federal program. The district court denied the motion, and Morgan pleaded guilty to two counts of conspiracy to violate §666. In the plea agreement, Morgan agreed not to appeal. In exchange, the Government dropped the seven bribery counts. After Morgan's plea, the Supreme Court confirmed the language of § 666(a)(1)(B) does not require the Government to prove the bribe affected federal funds. *See Salinas v. United States*, 522 U.S. 52, 61 (1997). The Court also held the statute's application to the defendant did not extend federal power beyond its proper bounds. *See id.* at 60-61. Because the bribe threatened the integrity and proper operation of the federal program, the statute was constitutional as applied to the facts of the case. *See id.* at 61.

Morgan later filed this 28 U.S.C. § 2255 motion to vacate his conviction and sentence asserting §666 was unconstitutional as applied in his case because "[t]he government neither alleged nor proved that the conduct for which [he] was indicted, convicted, and sentenced had any connection with the expenditure of federal funds or posed any threat to the integrity and proper operation of a federal program." *See Salinas*, 522 U.S. at 60-61; *United States v. Santopietro*, 166 F.3d 88, 93 (2d Cir. 1999) (*Salinas* may be read as requiring a threat to a federal program's integrity and proper operation to assure § 666 is not unconstitutionally applied); *United States v. Zwick*, 199 F.3d 672, 687 (3rd Cir. 1999) (§ 666 requires government to prove federal interest is

implicated by defendant's offense conduct); *United States v. Phillips*, 219 F.3d 404, 412-14 (5th Cir. 2000) (§ 666 does not reach misconduct of local officials whose actions do not threaten the integrity of federal funds or programs); *but see United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999). The Government responded that Kansas City's receipt of at least $10,000 in federal benefits provided the necessary federal connection. The district court denied Morgan's motion without holding a hearing. In the district court's view, Morgan's claim was procedurally barred because he did not raise it on appeal, and he did not qualify for the actual innocence exception to procedural bar because his claim was one of legal, rather than factual, error. The district court also rejected Morgan's motion on the merits, holding the necessary federal connection was supplied by the city's receipt of at least $10,000 in one year. Morgan appealed, and we certified two questions for our review: (1) whether 18 U.S.C. § 666 can be constitutionally applied to punish acts of local bribery that did not threaten the integrity of federal benefits received by the City or the City's administration of any federal program, and (2) whether Morgan's claim that his conduct was beyond the power of the federal government to proscribe is a claim of "actual innocence" he is entitled to raise for the first time on collateral review. "Appellate review is limited to the issues specified in the certificate of appealability." *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000).

Because Morgan has procedurally defaulted his claim by failing to raise it on direct review, he can raise the claim in collateral proceedings only if he first shows either cause and actual prejudice or actual innocence. *See Bousley v. United States*, 523 U.S. 614, 622 (1998). To establish actual innocence, Morgan must show "'it is more likely than not that no reasonable juror would have convicted him.'" *Id.* at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)).

Morgan argues he is actually innocent because his

conduct was beyond the power of the federal government to proscribe. Relying on *Salinas* and later circuit cases, Morgan contends § 666 cannot be constitutionally applied unless the Government proves a federal interest is implicated by his offense conduct, and the record does not support a finding of that federal connection in his case. Given the constitutional constraints on the statute's reach, Morgan says, a violation of § 666, as that statute is properly construed, never occurred. Pointing to *Bousley*, Morgan asserts his is a classic claim of factual innocence.

We conclude Morgan's is not an actual innocence claim he may raise for the first time on collateral review. In *Bousley*, a defendant who pleaded guilty to using a firearm in connection with a drug trafficking crime before the Supreme Court clarified the use requirement in *Bailey v. United States*, 516 U.S. 137 (1995), sought to attack his guilty plea on collateral review. Although the petitioner had made no direct appeal claiming his guilty plea was unintelligent because the district court misinformed him about the elements of the offense, the Supreme Court allowed the petitioner a chance to show his actual innocence and thus excuse the default by establishing he had not used the firearm within the meaning of *Bailey*. Thus, in *Bousley* and other cases, courts have permitted petitioners collaterally to attack guilty pleas on the basis of intervening decisions modifying the substantive criminal law defining the offense, despite procedural default, if the petitioner makes a showing of actual innocence—that the petitioner did not commit the offense as modified. *Cf. Embrey v. Herschberger*, 131 F.3d 739, 741 (8th Cir. 1997) (en banc) (pre-*Bousley* case).

Unlike the situation faced in *Bousley* after *Bailey* clarified the meaning of use in § 924(c), there is no definitive announcement in *Salinas* clarifying the elements of § 666. There is no intervening controlling precedent between the time of Morgan's guilty plea and collateral proceedings that has clearly established Morgan's actions do not constitute a

crime and thus that he is actually innocent of the charged offense. Because the Supreme Court in *Salinas* no more than suggested the requirement Morgan asserts is absent in his case, Morgan cannot show "'it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623. Morgan's actual innocence claim fails, and he cannot overcome the procedural bar.

Even if Morgan could show a "gateway" factual innocence claim, his underlying constitutional claim does not challenge his guilty plea. *See id.* at 624 (if Bousley shows on remand he did not use a firearm as defined in *Bailey*, he will be entitled to consideration of defaulted unintelligent plea claim considered on merits); *Hohn v. United States*, 193 F.3d 921, 922 (8th Cir. 1999). Once the judgment of conviction on a guilty plea becomes final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. *See United States v. Broce*, 488 U.S. 563, 574-75 (1989); *see also Dejan v. United States*, 208 F.3d 682, 685 (8th Cir. 2000) (defendant who pleaded guilty was required to show guilty plea was constitutionally infirm to obtain habeas relief). To be voluntary, the plea must be knowingly and intelligently made. A plea is not "intelligent" unless the defendant first receives "real notice of the true nature of the charge against him," and the defendant, his attorney, and the court correctly understood the essential elements of the crime. *See Bousley*, 523 U.S. at 618. But Morgan does not assert his guilty plea was unintelligent, or constitutionally infirm in any other way. Moreover,

> [a]s a general rule, "[a] defendant's knowing and intelligent guilty plea forecloses 'independent claims relating to the deprivation of constitutional rights that occurred before the entry of the guilty plea.'" *United States v. Vaughan*, 13 F.3d 1186, 1187 (8th Cir. 1994) (quoting *Tollett v. Henderson*, 411 U.S. 258, 267 (1973)). There are exceptions to this rule,

> however; a person may, despite a valid guilty plea, pursue a certain type of claim that has been variously defined as a claim that attacks "the State's power to bring any indictment at all," *United States v. Broce*, 488 U.S. 563, 575 (1989), that protects a defendant's "right not to be haled into court," *Blackledge v. Perry*, 417 U.S. 21, 30 (1974), and that "the charge is one which the State may not constitutionally prosecute," *Menna v. New York*, 423 U.S. 61, 62-63 n.2 (1975) (per curiam). We have often interpreted these Supreme Court cases to foreclose claims that raise "nonjurisdictional" issues and to permit only claims that question the trial court's "jurisdiction."

Weisberg v. State of Minnesota, 29 F.3d 1271, 1279-80 (8th Cir. 1994). A claim that a statute is facially unconstitutional falls within the exception. *See Sodders v. Parratt*, 693 F.2d 811, 812 (8th Cir. 1982) (holding guilty plea does not foreclose attack on constitutionality of criminal statute under which defendant was charged—defendant claimed statute was vague on its face); *United States v. Johnston*, 199 F.3d 1015, 1019 n.3 (9th Cir. 1999). No court has applied the exception to a claim, like Morgan's, that a statute is unconstitutional as applied. *See Johnston*, 199 F.3d at 1019 n.3. Nor does Morgan contend his case falls within the exception.

We conclude the district court properly rejected Morgan's § 2255 motion as procedurally barred.

BYE, Circuit Judge, specially concurring.

I am pleased that the majority opinion explicitly recognizes a facial constitutional challenge exception to the procedural default doctrine. The facial constitutional challenge exception has deep roots. *See Ex parte Siebold*, 100 U.S. 371 (1879) (seminal case); *see also United States v. Broce*, 488 U.S. 563, 574-76 (1989); *Haring v. Prosise*, 462

U.S. 306, 319-22 (1983); *Menna v. New York*, 423 U.S. 61, 62 & n.2 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21, 29-30 (1974); *United States ex rel. Swanson v. Reincke*, 344 F.2d 260, 261 (2d Cir. 1965); *United States v. Gaertner*, 583 F.2d 308, 311 (7th Cir. 1978); *Journigan v. Duffy*, 552 F.2d 283, 288-89 (9th Cir. 1977) *Jellum v. Cupp*, 475 F.2d 829, 830 (9th Cir. 1973); *Owens v. Wainwright*, 698 F.2d 1111, 1114-15 (11th Cir. 1983) (per curiam) (implied holding); *cf. United States v. Drew*, 200 F.3d 871, 880-83 (D.C. Cir. 2000) (Edwards, C.J. concurring) (acknowledging the *Blackledge-Menna* line of cases and urging adherence thereto in the District of Columbia Circuit).[1]

Although we had not explicitly applied the exception in a case procedurally similar to Morgan's case, *cf. Weisberg v. State of Minnesota*, 29 F.3d 1271, 1279-80 (8th Cir. 1994), *Sodders v. Parratt*, 693 F.2d 811, 812 (8th Cir. 1982) (per curiam), *Country v. Parratt*, 684 F.2d 588, 589 n.1 (8th Cir. 1982), the exception is a sound one. Surely it offends our system of ordered liberty to permit a prisoner to remain incarcerated when the statute under which he was convicted exceeded Congress' lawmaking power to enact.

Although I join the majority opinion, I write separately (perhaps only for my own benefit) to lament the fact that

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[1] It's worth noting that this exception is *not* jurisdictional in character, although many courts have erred in this direction. The *Siebold* Court described its holding as jurisdictional, *see Siebold*, 100 U.S. at 377, but that was a judicial stratagem. When *Siebold* was decided, Congress permitted federal courts to grant habeas relief only in cases where the sentencing court lacked jurisdiction, hence the *Siebold* Court had to strong-arm the unconstitutionality peg into the jurisdictional hole. *See generally Withrow v. Williams*, 507 U.S. 680, 718-19 (1993) (Scalia, J., concurring and dissenting) (explaining that the late 19th century Court expanded the term *jurisdiction* to encompass *constitutional challenges* as part of a thinly-veiled effort to broaden habeas relief—then limited solely to jurisdictional questions--but that the Court abandoned that approach in the 1940s when Congress liberalized federal habeas relief); *Stone v. Powell*, 428 U.S. 465, 474-78 (1976).

Morgan may not raise the one claim that has merit. An administrative panel of this court granted Morgan a certificate of appealability (COA) that permitted him to raise *only* an actual innocence challenge to his federal-program bribery conviction, 18 U.S.C. § 666. The administrative panel's decision effectively sounded the death-knell for Morgan's appeal because, without doubt, Morgan is *not* actually innocent of that crime. At his change-of-plea hearing, Morgan pleaded guilty to each of the elements of § 666. Hence Morgan cannot sustain the sole challenge he may raise in this appeal. *Cf. DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) ("[A]ppellate review is limited to the issues specified in the certificate of appealability.").[2]

Morgan does have a meritorious claim. We simply cannot reach that claim because it wasn't included in his COA. His meritorious claim is a facial constitutional challenge to § 666, the very challenge we acknowledge in the majority opinion—a cruel irony.

Section 666 prohibits acts of bribery, theft, and fraud against state and local governments (and certain other organizations) receiving funds under federal assistance programs. *See Fischer v. United States*, 529 U.S. 667 (2000). The statute enacts criminal penalties for those who:

(1) offer anything with a value of more than $5000;

(2) to any agent of a state or local government; and

(3) that government receives more than $10,000 per

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[2]*DeRoo* and its predecessor cases forbid *prisoners* from raising issues not included within their COAs. We have not held, in my view, that a *hearing panel* is likewise forbidden from expanding the scope of a COA. Although I would have preferred to do precisely that in Morgan's case, restraint counsels a different conclusion. A COA is "law of the case," and it is perhaps best that the eventual hearing panel not reconsider the administrative panel's judgment in establishing the scope of a prisoner's COA.

year in federal funds.

See 18 U.S.C. § 666.

The statute's sweeping language implies that the federal government may prosecute bribers whose activities bear no direct relation to the government's receipt of federal funds. *See Salinas v. United States*, 522 U.S. 52, 56-57 (1997) (recognizing that the language of § 666 authorizes almost limitless criminal liability because of the "expansive, unqualified language"). In *Salinas*, a statutory interpretation case, the Supreme Court observed that Congress had enacted a breathtakingly broad criminal statute. But the Court was not asked to probe the constitutionality of § 666. Salinas challenged only the meaning of the words in the statute. *See id.* at 59-60.[3]

Two circuits have recently discussed the constitutionality of § 666, and upheld the law as a valid exercise of Congress's Spending Clause power. *See United States v. Santopietro*, 166 F.3d 88, 92-94 (2d Cir. 1999); *United States v. Zwick*, 199 F.3d 672, 687 (3d Cir. 1999). Yet both the Second and Third Circuits were troubled by the sweeping breadth of § 666. Each court determined that § 666 could be saved from constitutional infirmity by reading into the text of the statute an additional "germaneness," or "nexus," requirement.[4] These courts in effect mandate that the quid pro quo *directly impact* funds that are federal in origin.

The approach taken by the Second and Third Circuits is fundamentally flawed for two reasons. First, and most

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[3] I acknowledge Justice Kennedy's constitutional speculations, *see Salinas*, 522 U.S. at 60-61, but they are precisely that—speculations. Because federal courts have no obligation to raise constitutional issues sua sponte, I am unable to wrench an implied constitutional holding from *Salinas*.

[4] The Sixth Circuit has explicitly rejected an additional "nexus" element. *See United States v. Dakota*, 188 F.3d 663, 668 (6th Cir. 1999).

obviously, federal courts are not free to rewrite the federal penal code. The Supreme Court has repeatedly admonished courts not to inject new elements into federal criminal statutes.

> Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. Only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.

United States v. Albertini, 472 U.S. 675, 680 (1985) (internal citations omitted and punctuation altered).

Second, even if a "nexus" element could be added in an effort to resuscitate § 666, the result would be wholly ineffectual. To put it bluntly, Congress lacks the power under the Spending Clause to enact criminal laws governing third-party conduct. Judicial efforts to render § 666 palatable by adding an element to the crime cannot alter our Constitution's basic limitation on federal legislative power. No amount of creative drafting permits the judiciary to preserve a statute that Congress plainly lacked the power to create.

Congress may not pass laws unless it acts pursuant to an express grant of power or authority in Article I of the Constitution. Section 666 cannot properly be linked to any grant of Congressional power in the Constitution. Hence, Congress exceeded its proper authority in enacting § 666; the law is unconstitutional, void *ab initio*. To explain this conclusion in greater depth requires a brief review of the two Article I provisions upon which Congress might have relied

to justify enactment of § 666. *See Crawford v. Davis,* 109 F.3d 1281, 1283 (8th Cir. 1997) (explaining that Congress need not correctly surmise the source of its authority in order to pass legislation, and may ground its legislative authority in multiple sources).

Every court that has addressed the issue has concluded that Congress adopted § 666 pursuant to its Spending Clause power. *See, e.g., United States v. McCormack,* 31 F.Supp.2d 176, 186 n.18 (D. Mass. 1998) (collecting cases); *see also Fischer,* 120 S. Ct. at 1793 n.3 (Thomas, J., dissenting). The Spending Clause provides that

> [t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

U.S. Const. art. I, § 8, cl. 1.

While Congress may disburse funds under this grant of power, Congress may not make laws. Congress may indirectly regulate state conduct by attaching "strings" to grants of money given to state and local governments, *see South Dakota v. Dole,* 483 U.S. 203, 206-207 (1987), but those strings aren't *laws. See generally* David E. Engdahl, *The Spending Power,* 44 Duke L.J. 1, 71 (October 1994) ("What makes [federal funding] conditions obligatory is that essence as contract, wholly apart from the circumstance that they happen to be spelled out in a statute or an agency rule. Although articulated in a statute or rule, they have no force as 'law'; their only force is contractual. Consequently, they are not among the 'Laws of the United States . . . made in Pursuance' of the Constitution, to which the Supremacy Clause applies.").

Indeed, Congress's Spending Clause power is comprehensible only by analogy to principles of contract law. *See Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1,

17 (1981) ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"); *cf. Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 610-11 (8th Cir. 1999) ("Title IX operates to condition an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. The fact that title IX was enacted pursuant to Congress's spending power is evidence that it prohibits discriminatory acts only by grant recipients. Several circuits have held that because they are not grant recipients, school officials may not be sued in their individual capacity under Title IX.") (internal punctuation and citations omitted).

In enacting § 666, however, Congress did not contract with states or local governments. Neither did Congress bestow gifts of funds upon those governments. Rather, Congress passed a federal criminal statute designed to punish conduct that falls within the domain of traditional state concerns (bribery, embezzlement, fraud, etc.). Section 666 reaches beyond punishment of the state and local governments who receive those funds to proscribe the conduct of third persons who aren't parties to the funding contract. Spending Clause power is not that broad.

The Spending Clause nowhere authorizes Congress to criminally legislate. Thus § 666 floats far from Congress's Spending Clause moorings. *See* Engdahl, 44 Duke L.J. at 92 ("[Section 666] lack[s] any basis in the Constitution . . . . Congress has no more power to punish theft from the beneficiaries of its largesse than it has to punish theft from anyone else. Federal dominion over federal property is irrelevant, because once any particular funds have been given to a recipient, those funds are not federal property anymore.

The Constitution does not contemplate that federal regulatory power should tag along after federal money like a hungry dog.") (emphasis added).

No court has suggested that Congress rested its power to enact § 666 on the Commerce Clause. Nor do the House and Senate Reports imply any such intent on the part of Congress. That's not really surprising; section 666 bears little coherent relationship to commerce. The text of § 666 reveals only a strong connection to federal funds. Section 666(b) has been termed a "jurisdictional provision," likely on the theory that if the bribee obtains at least $10,000 in federal funds, then the federal government has an interest in prosecuting. But this $10,000 threshold does nothing to screen out *intra* state bribery. Most intrastate bribery falls outside the ambit of Congress's Commerce Clause power. Thus Congress could not have grounded § 666 on its Commerce Clause power.

Article I contains numerous explicit grants of power to Congress. But none of these powers remotely concerns federal criminal penalties for bribery. I am forced to conclude—albeit with some reluctance—that Congress lacked the power to enact § 666 as a federal crime. My reluctance stems largely from the fact that "[n]o court ... has ever struck down a federal statute on grounds that it exceeded the Spending Power." *Commonwealth of Va. v. Browner*, 80 F.3d 869, 881 (4th Cir. 1996). Yet I find that to be an unavoidable conclusion in this instance.

Section 666 is, I believe, the only federal crime whose supposed constitutional basis is the Spending Clause. That may speak volumes. Congress may well realize the fragile power of the Spending Clause—in particular, the fact that the Clause confers upon Congress no criminal lawmaking power.

Had Morgan been permitted to raise a facial constitutional challenge to his conviction by the administrative panel, I would strike down § 666 as an unconstitutional exercise of Congress's Spending Clause

power. Because the administrative panel has placed the matter beyond my grasp, however, I must respectfully concur, despite my deep reservations about the soundness of Morgan's conviction.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-2798

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States Court for the
v.	*	Western District of
	*	Missouri
Mark A. Morgan,	*	
	*	[PUBLISHED]
Appellant.	*	

BEFORE: Wollman, Chief Judge, McMillian, Richard S. Arnold, Bowman, Beam,[1] Loken, Hansen, Morris Sheppard Arnold, Murphy, and Bye, Circuit Judges, En Banc.

The petition for rehearing by the panel is denied. The petition for rehearing en banc is also denied. The court notes in denying rehearing en banc that the panel decisions in this case and in *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000), should not be read as foreclosing the right of an Eighth Circuit hearing panel to exercise its discretion to consider *sua sponte* issues beyond those specified in a certificate of appealability, whether the certificate was issued by a district court or by an administrative panel of this court.

BYE, Circuit Judge, concurring in part and dissenting in part.

After the district court denied Mark Morgan's 28 U.S.C. § 2255 motion, an administrative panel of this court certified

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[1]The Honorable C. Arlan Beam assumed senior status on February 1, 2001.

two issues for review by a hearing panel. The administrative panel declined to certify a third issue that Morgan raised—whether 18 U.S.C. § 666 is facially unconstitutional. Because our prior cases explained that a hearing panel may not review uncertified issues, *see, e.g., DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) ("Appellate review is limited to the issues specified in the certificate of appealability."), the hearing panel properly refused to consider Morgan's facial constitutional challenge. *United States v. Morgan*, 230 F.3d 1067, 1069 (8th Cir. 2000) (quoting *DeRoo, supra*). I joined in the panel opinion because of *DeRoo*'s binding effect.

Today's order explains that *DeRoo* and its predecessors do not prevent a hearing panel from exercising its discretion to consider uncertified issues *sua sponte*. I agree fully with this approach, and I join in so much of the order as explains this principle.

At this juncture, then, we may finally consider Morgan's facial constitutional challenge without procedural impediment. Because that challenge has merit, *see Morgan*, 230 F.3d at 1072-75 (Bye, J., specially concurring), and bears careful consideration by our court, I dissent from the decision to deny rehearing en banc.

March 19, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

[FILED Jun 14 1999 1:45 pm]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)
	) Case No. 99-03895-
v.	) CV-W-4
	)
MARK A. MORGAN, Defendant.	) Crim. No. 95-00125-
	) 01-CR-W-4
	)

ORDER DENYING MOTION OF MARK A. MORGAN TO VACATE AND SET ASIDE SENTENCE PURSUANT TO 28 U.S.C. § 2255

Mark A. Morgan, along with two co-defendants, was indicted on July 25, 1995, and charged with two counts of conspiracy (18 U.S.C. § 371), two counts of federal-program bribery (18 U.S.C. § 666), and six counts of money laundering (18 U.S.C. §§ 1956 & 1957). Mr. Morgan pleaded not guilty, and moved to dismiss the indictment. He contended, among other things, that both the United States Constitution and Section 666 itself required the government to demonstrate a connection between the alleged bribes and federal-program funds received by the City of Kansas City. On November 15, 1995, the District Court (Stevens, J.) dismissed the six money-laundering counts, but not the four program-bribery and conspiracy counts. The Court held that: "The enactment of 18 U.S.C. § 666 was a proper exercise of Congress' manifest spending power. Moreover, there is no constitutional requirement that the government show a nexus between the federal funds and the alleged incidents of

bribery. *See e.g., United States v. Coyne,* 4 F.3d 100, 109 (2d Cir. 1993)."

Almost two years later, on July 17, 1997, the grand jury returned a nine-count superseding indictment against Mr. Morgan and his co-defendants. Although the underlying factual allegations were the same as those set out in the initial indictment, the superseding indictment charged seven counts of federal-program bribery (18 U.S.C. § 666) and two counts of conspiring to violate Section 666 (18 U.S.C. § 371).

Mr. Morgan again moved to dismiss the Section 666 charges as unconstitutional because the government failed to allege any relation between the alleged bribes and federal-program funds. On October 17, 1997, a magistrate judge found that, "This Court previously held that the enactment of § 666 was a proper exercise of Congress' power under the Spending Power of the General Welfare Clause and the Necessary and Proper Clause and the government is not required to charge or prove that the alleged bribes substantially threatened the integrity of identifiable federal funds."

On October 20, 1997, the defendant filed his objections to the Magistrate's Report and Recommendation and on October 22, 1997, the government filed its response. On October 23, 1997, Mr. Morgan pled guilty to the two conspiracy counts in the indictment pursuant to a plea agreement.

The plea agreement called for the defendant to plead guilty to the two conspiracy counts in the indictment in exchange for the government moving to dismiss the remaining counts of the indictment. The plea agreement stated that, "The defendant admits that he knowingly committed these offenses and is in fact guilty of these crimes." In the plea agreement, the defendant also waived his right to appeal. The Agreement stated that, "In exchange for the concessions made by the government in this

Agreement, the defendant voluntarily and knowingly waives the following rights:

(a) His right to appeal any aspect of his conviction, including any pretrial suppression or other pretrial disposition of motions and issues.

In his change of plea hearing, Mr. Morgan acknowledged that the had committed the crimes charged. After being advised of his rights by the Court, the following colloquy took place:

THE COURT: Now having discussed these rights, your having acknowledged them, do you still want to plead guilty to these two counts?

THE DEFENDANT: Yes, sir.

THE COURT: Have you received a copy of the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Have you gone over it with Mr. Mortenson?

THE DEFENDANT: Yes, sir.

THE COURT: Has he explained what it is the government would have to prove in order for you to be found guilty of these charges?

THE DEFENDANT: Yes, sir.

THE COURT: Are you convinced in your own mind the government would be able to make that proof?

THE DEFENDANTS: Yes.

After explaining the conspiracy counts to the defendant, the Court asked: "Did you do those things?" The defendant responded, "Yes, sir."

At the change of plea hearing, the government discussed the jurisdictional basis for the bribery charges. Following these statements by the government, the defendant and his attorney acknowledged that the evidence would be sufficient to meet all the elements of the bribery offense. The following colloquy took place:

> THE COURT: Have you familiarized yourself with the available pages (discovery), Mr. Mortenson?
>
> MR. MORTENSON: Yes, we have reviewed all the material that have [sic] been produced.
>
> THE COURT: Are you satisfied in your own professional judgment the United States would be able to prove what it alleges about these two offenses beyond a reasonable doubt?
>
> MR. MORTENSON: I believe the government would be able to prove the elements of the charges beyond a reasonable doubt. The specific factual points might be in disagreement but the overall evidence that the government would need to prove each element of the violation, there is evidence to support that.
>
> THE COURT: And is it your judgment then a finding by a jury of guilty to both offenses would be justified by the evidence?
>
> MR. MORTENSON: Yes.
>
> THE COURT: Would you agree with that, Mr. Morgan?
>
> THE DEFENDANT: Yes, Your Honor.

Thereafter, defense counsel interrogated his client in order to establish a record that defendant Morgan was in fact guilty of the offenses to which he was pleading guilty. Counsel for the defendant reviewed each of the charges and Morgan acknowledged that he was guilty of these offenses. The following questions and answers occurred during this portion of the change of plea.

MR. MORTENSON: Nonetheless, did you at the time agree to do so in order to reward Mr. Hernandez through a contribution to the charity for the vote he had given on Line Creek Parkway?

THE DEFENDANT: Yes, that I did.

MR. MORTENSON: Did you do so intentionally?

THE DEFENDANT: Yes, sir.

MR. MORTENSON: And you understand that rewarding a public official for an official act is unlawful.

THE DEFENDANT: Yes.

MR. MORTENSON: And therefore you agree you have violated the statute with which you are charged.

THE DEFENDANT: Yes.

* * *

MR. MORTENSON: And did you make the payment knowing full well that its purpose was to influence Mr. Hernandez in assisting with the Barry Special transaction?

THE DEFENDANT: Yes, that is what I did.

MR. MORTENSON: And do you understand that having that intention, that this is a violation of federal law?

THE DEFENDANT: Yes, I do.

MR. MORTENSON: And therefore do you agree you are guilty of the charges of Count Seven concerning Barry Special?

THE DEFENDANT: Yes, I am guilty.

MR. MORTENSON: Thank you.

"It is well-settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by

competent counsel, may not be collaterally attacked." *Mabry v. Johnson,* 467 U.S. 504, 508, 104 S. Ct. 2543, 2546 (1984).

In *Bousley v. United States*, ____ U.S. ____, 118 S. Ct. 1604 (1998), the Court considered a § 2255 petition in the context of a claim arising from the decision in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501 (1995). The *Bailey* decision had given rise to numerous § 2255 petitions from those defendants who had earlier pled guilty to using or carrying a firearm during a crime of violence or drug trafficking offense because the Supreme Court greatly narrowed the scope of 18 U.S.C. § 924(c).

In *Bousley*, the Court reviewed the law relating to a § 2255 petition after a defendant had pled guilty. The thrust of the defendant's argument in *Bousley* was that no one, neither the defendant, his counsel, or the Court had understood that "active use" was an element of § 924(c). The Court held that because of the change in the scope of the law announced in *Bailey*, Bousley would be able to claim that his guilty plea was constitutionally invalid and was not procedurally barred.

The Court then restated long-held positions that "a plea of guilty is constitutionally valid only to the extent it is 'voluntary' and 'intelligent.'" *Id.* at 1609, *quoting Brad v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469 (1970). The Court stated that "the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and 'will not be allowed to do service for an appeal.'" *Id.* at 1610, *quoting Reed v. Forley*, 512 U.S. 339, 354, 114 S. Ct. 2291, 2300 (1994). The Court stated that the limitation on collateral attack "has special force with respect to convictions based on guilty pleas." *Bousley*, [sic] at 1610.

Just as in *Bousley*, petitioner Morgan did not challenge the validity of his plea on direct appeal. In *Bousley*, the Court held that "where a defendant has procedurally

defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice", . . . [sic] or that he is actually "innocent" . . . [sic] *Id.* at 1611. Mr. Morgan now claims in his § 2255 motion that he is "actually innocent."

It must therefore be determined what "actual innocence" means in the context of habeas petition. In *Embrey v. Hershberger,* 131 F.3d 739 (8th Cir. 1997) (en banc), the Court of Appeals considered whether the petitioner qualified for the "actual innocence" exception to the bar to successive habeas petitions. The Court determined that the prisoner's claim of legal error, rather than factual error, does not qualify as a claim of "actual innocence."

The *Embrey* case involved a defendant who had been convicted of bank robbery and kidnapping. Embrey claimed tat Congress intended the bank robbery statutes to cover the entire scope of his conduct and thus he was not eligible for a sentence under the Federal Kidnapping Act. Embrey argued that because he was not eligible for sentence under the Federal Kidnapping Act, he was "actually innocent" of it and therefore he qualified for that exception to the bar on successive petitions.

In *Embrey*, the Court of Appeals concluded that:

> Mr. Embrey's claim . . . is simply a legal not a factual one, and the Supreme Court has 'emphasized that the miscarriage of justice exception is concerned with actual as compared with legal innocence.' *Sawyer*, 505 U.S. at 339, 112 S. Ct. at 2518. A legal claim that a substantive criminal statute has been wrongly applied to facts can, by resort [sic] always be converted into a complaint that the relevant facts did not support a conviction and that therefore the defendant was "actually innocent." But that proves too much, for then any such claim can be said to be

> one of actual innocence, effectively undermining the barrier to post-conviction relief that the principle of actual innocence was meant to erect.

Embrey, 131 F.3d at 741.

Here, Mr. Morgan renews his legal claim that the Constitution requires that there be an effect on specific federal funds or programs from the bribes in order for there to be federal jurisdiction. This is a legal claim no different than petitioner Embrey's claim that the bank robbery laws precluded his conviction for kidnapping. Mr. Morgan is not actually innocent and his claim of an unconstitutional conviction is barred.

Nonetheless, even if Mr. Morgan's claim was not procedurally barred, his claim that the government neither alleged nor proved that the conduct for which he was indicted, convicted and sentenced had no connection with the expenditure of federal funds or posed any threat to the integrity and proper operation of a federal program is without merit.

In *Salinas v. United States*, 118 S. Ct. 469 (1997), as in the case at bar, the defendant claimed that the government was required to prove that the bribe in some way affected federal funds. The Supreme Court rejected this contention. The Court stated:

> The enactment's expansive, unqualified language, both as to the bribes forbidden and the entities covered, does not support the interpretation that federal funds must be affected to violate § 666(a)(1)(B). Subject to the five thousand dollar threshold for the business or transaction in question, the statute forbids acceptance of a bribe by a covered official who intends "to be influenced or rewarded in connection with any business, transaction, or series of transaction of (the defined) organization, government

> or agency." § 666(a)(1)(B). The prohibition is not confined to a business or transaction which affects federal funds. The word "any," which prefaces the business or transaction clause, undercuts the attempt to impose this narrowing construction.

Id. at 473.

The Court further stated that "the broad definition of these 'circumstances' to which the statute applies provides no textual basis for limiting the reach of the bribery prohibition. The statute applies to all cases in which an organization, government or agency receives a statutory amount of benefits under a federal program." *Id.*

After reviewing various rules of statutory construction and the legislative history of the statue, the Court concluded that "the text of §666(a)(1)(B) is unambiguous on the point under consideration here, and it does not require the Government to prove federal funds were involved in the bribery transaction." *Id.* at 475.

The sole case from this Circuit dealing with § 666 found that the statute should be "broadly construed" and could therefore be applied to funds that were never owned by the federal government. *United States v. Perry*, 977 F.2d 1230, 1232 (8th Cir. 1992).

The federal "nexus" is supplied by the requirement that the government or agency received at least $10,000 in a year and involved a matter of value of $5,000 or more. This defines a substantial federal interest which Congress has determined is necessary and proper to the disbursement of federal funds. As explained by the court in *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988):

> Moreover, the statute does not encompass every local bribery as Westmoreland suggests. Although the extent of the federal government's assistance programs will bring many organizations and agencies

> within the statute's scope, the statute limits its reach to entities that receive a substantial amount of federal funds and to agents who have the authority to effect significant transactions.

Thus, the "nexus" of federal interest, the dollar values of federal funding and the subject matter of the bribe, is integrated with the language of the statute. The United States pled and was prepared to prove the existence of this federal interest. Furthermore, in this case, Mr. Morgan was involved with the bribery of a Kansas City Councilman who had authority over the policy, practice and legislation of the City as it effected all city programs and expenditures. Thus, Mr. Morgan's efforts toward corruption of Mr. Hernandez threatened the expenditure of federal funds and posed a threat to the integrity and proper operation of programs supported by federal funds by virtue of Mr. Hernandez's ability to influence those funds and programs. Certainly the federal government has an interest in federal funds and programs supported by the federal government being administered by honest officials.

WHEREFORE, for the reasons stated herein, Mr. Morgan's motion to vacate and set aside is sentence (Doc.#1) is DENIED.

/s/_____
GARY A. FENNER, JUDGE
United States District Court

DATED: 6-14-99